



**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**MILIMANI LAW COURTS**

**COMMERCIAL AND TAX DIVISION**

**CORAM: D.S. MAJANJA J.**

**TAX APPEAL NO. E024 OF 2020**

**BETWEEN**

**AFRICA OIL KENYA BV ..... APPELLANT**

**AND**

**COMMISSIONER OF DOMESTIC TAXES ..... RESPONDENT**

***(Being an appeal against the judgment of the Tax Appeals Tribunal made on 27<sup>th</sup> March 2020 in Nairobi Tax Appeal No. 347 of 2018)***

**RULING NO. 2**

**INTRODUCTION**

1. The respondent (“the Commissioner”) has moved the court by a Notice of Motion dated 21<sup>st</sup> April 2020 under its inherent jurisdiction, **section 3A** of the **Civil Procedure Act (Chapter 21 of the Laws of Kenya)** and **Order 45** of the **Civil Procedure Rules** seeking the following orders:

*i. This Honourable Court do vary its Order of 21<sup>st</sup> April, 2020 to provide security for the Value Added Taxes of Kshs. 2,293,334,065 which were found payable following the Judgment of the Tax Appeal Tribunal pending hearing and determination of the Appeal herein;*

*ii. The Court do make any other order that it deems fit in the circumstances; and*

*iii. Cost of this application be provided for.*

2. The application is supported by the grounds set out in the face of the application and the supporting affidavit of Philip Sylvester Wabwire, an officer of the respondent, sworn on 21<sup>st</sup> April 2020. It is opposed by the Replying Affidavit of Mark Dingley, the appellant’s Managing Director, sworn on 22<sup>nd</sup> April 2020.

**Background**

3. Before I deal with the issues raised in the application, it is important to set out the uncontested background facts. The appellant filed a Notice of Motion dated 8<sup>th</sup> April 2020 seeking an order staying enforcement of the decision of the Tax Appeal Tribunal (“the Tribunal”) made in favour of the Commissioner to the extent that the Tribunal ordered that, “*Demand for Kshs. 2,293,334,065.44 being VAT on farm-out transactions for 2011, 2012 and 2016 be reviewed to exclude assessment in respect of the 2011 and 2012.*” [Emphasis mine]

4. Following that decision, the Commissioner issued an agency notice to Citi Bank Kenya under **section 42** of the **Tax Procedures Act** demanding Kshs. 2,293,334,065.44 on account of VAT owed by the appellant. It is this action that precipitated the appellant’s Notice of Motion dated 8<sup>th</sup> April 2020 seeking stay of execution pending appeal.

5. I heard the application and by my ruling dated 21<sup>st</sup> April 2020, I made the following orders:

For the reasons I have set out above, I allow the Notice of Motion dated 8<sup>th</sup> April 2020 on the following terms:

(a) An order of stay be and is hereby issued staying execution of the judgment of the Tax Appeal Tribunal dated 27<sup>th</sup> March 2020 in Tax Appeal Tribunal Appeal No. 347 of 2018 together with the Agency Notice dated 7<sup>th</sup> April 2020 served on Citi Bank Kenya Limited for the sum of Kshs. 2,293,334,065 pending the hearing and determination of this appeal or until further orders of the court.

(b) The costs of this application shall be in the appeal.

(c) The court shall adjourn to issue directions for the hearing and determination of the appeal.

### Commissioner's Submissions

6. It is the order of stay of execution and enforcement of the Tribunal decision that the Commissioner now seeks to review. In support of the application, counsel for the Commissioner, Mr Ochieng outlined the history of the matter. He explained that the dispute commenced when the Commissioner issued an assessment on 29<sup>th</sup> June 2020 for VAT made up as follows; Kshs. 23,207,810.68 for 2011, Kshs. 461,621,854.20 for Kshs. 2012 and Kshs. 2,293,334,065.44 for the year 2014 making a total of Kshs. 2,778,153,730.42.

7. The Commissioner confirmed the assessment after the appellant lodged an objection precipitating the proceedings before the Tribunal. The Tribunal found that the assessments for the years 2011 and 2012 were caught up by the 5-year limitation period and directed that the assessment be amended to exclude those assessments. However, in its final judgment, the Tribunal's order captured the 2015 figure instead of the whole amount that was subject to the excluded assessments. As a result of the Tribunal's finding, the Commissioner proceeded to demand the amount due for 2015 having excluded the amounts for the years 2011 and 2012.

8. Mr Ochieng submitted that the error on the amount subject of the agency notice is self-evident and it is an error apparent on the face of the record. Consequently, he submitted, that this court should now proceed to order security as the amount claimed in the agency notice is not contested to the extent that it relates to VAT assessed for the year 2015 only as the Tribunal excluded the amount for the years 2011 and 2012. Counsel pointed out that its position is buttressed by the judgment which shows that it has only demanded the taxes for the year 2015 as the original amount in the assessment was Kshs. 2,778,153,730.42.

9. Mr Ochieng further submitted that this court has inherent jurisdiction to vary its order of 21<sup>st</sup> April 2020 as it was occasioned by an error on the face of the record of the Tribunal which resulted in this court making a further error on the face of the record by declining stay. Counsel added that unless the appellant is ordered to provide security, the Commissioner would be denied the fruits of its judgment and would suffer loss of taxes as the appellant was a foreign company.

### Appellant's Submissions

10. Counsel for the appellant, Ms Mwangi, submitted that for all intents and purposes, the Commissioner's application was for review and in the circumstances, it did not satisfy the test for grant of orders of review in form and substance. Counsel pointed out that the Commissioner seeks contradictory orders as it seeks variation of the orders issued on 21<sup>st</sup> April 2020 on the basis of the amount it seeks to recover and that it requests the court to order the appellant to provide security.

11. Ms Mwangi posited that the Commissioner was saying that the court got it wrong on the figures in question on the one hand and on the other hand it was asking the court to order security in relation to the same decision it was challenging. In the circumstances, the appellant contended that the Commissioner's case did not amount to an error on the face of the record but was an incorrect or erroneous exposition or conclusion which was the subject of appeal. Counsel referred to **National Bank of Kenya v Ndungu Njau NRB CA Civil Appeal No. 211 of 1996 [1997] eKLR** to support the submission that it was not a sufficient ground for review that a court proceeded on an incorrect exposition and reached an erroneous conclusion.

12. As regards the issue of security, the appellant took the view that whether or not the court should order security cannot be a ground of review but a matter for appeal.

### Determination

13. The crux of the Commissioner's application concerns the fact that the court declined to order security because it considered that the final decision or order of the Tribunal was that, "Demand for Kshs. 2,293,334,065.44 being VAT on farm-out transactions for 2011, 2012 and 2016 be reviewed to exclude assessment in respect of the 2011 and 2012." The court considered that in line with the aforesaid order, the sum of Kshs. 2,293,334,065.44 was to exclude the assessments for the years 2011 and 2012 which the Commissioner had not re-assessed. In my ruling dated 21<sup>st</sup> April 2020, I stated as follows:

[12] ..... The judgment in favour of the Commissioner was that the demand for VAT be reviewed to exclude certain assessments for the year 2011 and 2012. There is no evidence that the Commissioner has complied with the judgment and reviewed the amount of Kshs. 2,293,334,065.44 it initially demanded from the appellant and which has for all intents and purposes has been set aside by the Tribunal subject to the review. It is the same amount that the Tribunal ordered to be reviewed that the Commissioner has now sought to enforce by issuing an agency notice.

[13] The effect of the agency notice is that the Commissioner has ignored the decision of the Tribunal. Since the initial assessment and demand has been varied in accordance with the Judgment, it is incapable of enforcement until the Commissioner complies with

*the Judgment. I therefore find that the Commissioner lacked a legal basis to issue an agency notice on the basis of the Tribunal Judgment. It therefore follows that I cannot order the appellant to provide security where the tax liability has not been determined as directed by the Tribunal.*

14. In the Commissioner's view, the Tribunal had already excluded the assessments for the year 2011 and 2012 in coming to its conclusion hence the final order was made in error. Counsel for the Commissioner conceded that the error it contained in the order of 21<sup>st</sup> April 2020, "was occasioned by an error in the face of the record of the TAT to exclude the assessment for 2011 and 2012." It is this error by the Tribunal that guided this court's decision staying the court's decision. In other words, in order for the Commissioner's application to succeed, the court must review and correct the order of the Tribunal.

15. The question that I have to resolve is whether, at this stage, I have jurisdiction to correct an error of the Tribunal through an application for review such as the one before the court. Without belabouring the point, this court has inherent jurisdiction to make orders to meet the ends of justice but the court cannot resort to inherent jurisdiction to correct an error for which the law provides a specific procedure (see ***Kenya Power and Lighting Company Limited v Benzene Holdings Limited t/a Wyco Paints NRB CA Civil Appeal No. 132 and 133 of 2014 [2016] eKLR***).

16. The only way for this court to review the decision of the Tribunal, which is now the subject of the appeal, is to hear and determine the appeal. The court takes the Tribunal decision as it finds it and can only vary it by determining the appeal. Since the Commissioner's application is predicated on a review of the decision of the Tribunal, it cannot succeed.

#### **Disposition**

17. Having come to the conclusion that the court lacks jurisdiction to review or correct the decision of the Tribunal outside the bounds of an appeal, I am constrained to dismiss the application dated 21<sup>st</sup> April 2020.

**DATED and DELIVERED at NAIROBI this 29<sup>th</sup> day of APRIL 2020.**

**D. S. MAJANJA**

**JUDGE**

Ms Mwangi with her Ms Omondi instructed by Coulson Harney LLP Advocates for the appellant.

Mr Ochieng, Advocate instructed by Kenya Revenue Authority for the Commissioner of Domestic Taxes.